No. 10077

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division

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JURISDICTION

This suit was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County, on February 5, 1941 (R-19) by filing complaint on the part of Harry E. Krussman, as Trustee of an Express Trust, a resident of the State of Idaho, against Omaha Woodmen Life Insurance Society, a corporation, incorporated under the laws of the State of Nebraska, to recover Five Thousand ($5,000.00) Dollars and interest and costs (R-1-15). On March 10, 1941, an Order was made by the District Judge of the Fifth Judicial District of the State of Idaho for the removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R 20-21). The jurisdiction of the District Court was based

upon Section 24 of the Judicial Code as amended, 28 U. S. C. A. Sec. 41. On May 1, 1941, an Answer was filed by the defendant (R 22-38) which was within the time prescribed by the Court (R 21-22). Said Answer was amended by Interlineation October 13, 1941 (R 38-41). Trial upon the issues commenced October 23, 1941, before the Honorable Charles C. Cavanah, sitting without a jury, and after evidence had been received the cause was taken under advisement and the Court rendered its opinion December 5, 1941 (R 41) awarding judgment in favor of the plaintiff for the sum prayed for in his Complaint (R 41-49). The opinion of the District Court appears in the record at pages 41-49. Findings of Fact and Conclusions of Law were made and filed December 23, 1941 (R 49-75), and Judgment in favor of plaintiff and against the defendant was made and entered the same day (R 75-76). Notice of Appeal was filed January 31, 1942 (R89-90). The Record on Appeal was certified by the Clerk of the District Court March 2, 1942 (R-303) and filed in this Court March 5, 1942 (R-304). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U. S. C. A. Sec. 225 (a).

STATEMENT OF THE CASE

This is a suit filed by the Appellee against the Appellant on a Certificate of Insurance issued by the Appellant to Eric A. Krussman (R 1-16). Mr. Krussman died August 2, 1940, (R-14). The Appellant in its Answer denied liability because the deceased failed to pay the monthly premiums as agreed in the Contract by reason whereof he became suspended as

a member and his Certificate of Insurance became void and was never thereafter reinstated (R-22-38, R-199). The Appellee, claiming to be the beneficiary, admits that various monthly payments became delinquent, but contends appellant accepted the delinquent payments made out of due time and thereby waived certain provisions of the contract relating to forfeiture, reinstatement, good health, etc. The waiver is denied by the Appellant and the right to insist upon said contractural obligations, as hereafter pointed out, was affirmatively asserted.

The appellant is a fraternal benefit society, organized under the laws of the State of Nebraska, having a lodge system, a ritualistic form of work and a representative form of government. It is conducted solely for the mutual benefit of its members and not for profit. (R 108). It qualified under the laws of Idaho and operates pursuant to Title 40, Chapter 23, I. C. A., 1932, dealing with fraternal benefit societies. A brief analysis of the contract with the appellant's interpretation thereof follows:

On August 7, 1935, Eric A. Krussman made application for membership in the society and sought its insurance advantages. In his application it is recited:

> "I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Asso-

> ciation, whether printed or referred to therein or not." (R 104-5).

The name "Pacific Woodmen Life Association" was, subsequent to said application, changed to the present name of "Omaha Woodmen Life Insurance Society."

On September 30, 1935, there was issued to Eric A. Krussman by the appellant an insurance certificate, a copy of which is pleaded haec verba in the complaint. (R 3-9, Plaintiff's Ex. No. 2). This certificate, among other things, recites that there should be paid a monthly sum "of $11.70 on or before the last day of each month thereafter." (R 4). Such payment was required before the end of the month for which it became due. The Certificate contains the following provision:

> "This Certificate is issued and accepted subject to all of the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all amendments to each thereof which may be made hereafter; the application for membership, * * * and this Certificate shall constitute the agreement between the association and the member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association, made subsequent to the issuance of this Certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in force

> at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act by any Camp Officer or members of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract." (R 5, 6).

There is a conspicuous recitation in the certificate as follows:

> "IMPORTANT. No camp or officer thereof nor any officer, employee or agent of the Assoc. has authority to waive any of the conditions of this beneficiary certificate or of the Constitution and Laws of this Association." (R 7-8).

The Constitution, Laws and By-Laws of the Society form part of said contract and reference to certain provisions therein is deemed advisable. These are in pamphlet form and there were three of them introduced in evidence by the Appellee as Plaintiff's Exhibits 3, 4 and 5. (R 108-125). Plaintiff's Exhibit 3 was in effect in its entirety when the Certificate was issued to Mr. Krussman. Plaintiff's Exhibits 4 and 5 show some amendments in various sections adopted after Mr. Krussman's Certificate was issued and before his death.

Section 63 of the Constitution, Laws and By-Laws of the Appellant, in force when Mr. Krussman became a member, among other things, provides:

> "Sec. 63 (a). In order to accumulate and maintain funds for the payment of benefits stipulated in bene-

> ficiary certificates held by members of this association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of expenses of this association, every member of this association shall pay to the financial secretary of his camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp Fund; and he shall also pay such camp dues as may be required by the By-Laws of his camp.
>
> (b). If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the association shall thereby completely terminate, * * * (Ex. 3, R 119-120).

In 1939 Section 63 (b) was amended to read as follows:

> "If he fails to make any such payment on or before the last day of the month *it shall thereby become delinquent,* he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, * * * "(Pls. Ex. 5).

Section 65 of the Constitution, Laws and By-Laws is particularly important. Briefly it is therein provided that if a member fails to make his payment as and when the same becomes due he may nevertheless thereafter, within the time therein stated, make such payment to the Society and the Society is required to accept the same, but that such payment is a warrant that the member is in good health and will remain

in good health for thirty days after such attempt to again become a member, and that the retention of said payment shall never be construed as a waiver of any of the provisions of said section or of the contract until such time as the Secretary of the Society shall have actual, not constructive or imputed knowledge that the person was not in good health when he attempted to become a member, and that receipt and retention of any delinquent payment, in case the person is not in good health shall not make the person a member or entitle his beneficiaries under his Certificate to any rights whatever. At the time Mr. Krussman became a member of the Association Section 65 was as follows:

> "Sec. 65. Any person who has become suspended because of non-payment of any installment of assessment, if in good health, may within three calndar months from the date of his suspension again become a member of the Association by the payment of the current installment of the assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the

retention of payment of such installments of assessments in case such a person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever." (Pl. Ex. 3, R 61-62).

Said section was amended to take effect as of September 1, 1937 and as thus amended provided:

"Sec. 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

"Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or benficiaries to any rights whatever." (Pl. Ex. 4 R-62-63)

Said section was again amended to take effect as of September 1, 1939, and as thus amended provided:

> "Sec. 65. Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.
>
> "Whenever payments are made by a person who has been suspended for more than fifteen days for the purpose of again becoming a member, such payment shall be hld to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or his beneficiary or beneficiaries to any rights whatever." (Pl. Ex. 5, R-63, 64).

The essential points for which appellant contends herein were not changed by the amendments except that in each instance the contract was made more certain in determining the necessity of prompt payment of installments and that the tender of such delinquent payments was for the purpose of reinstatement. We have quoted the section from each of these exhibits for convenience of this Court and call attention to the fact that the trial court likewise quoted them in its Findings (R-61-64).

Section 66 of the Constitution, Laws and By-Laws provides:

> "Sec. 66 (a) The retention by the Association of any installment or assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.
>
> (b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void." (R. 64, 65).

Section 82 (a) of the Constitution, Laws and By-Laws of the defendant, provides:

> "Sec. 82 (a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions

> upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these laws, nor shall any custom on the part of any Camp or any number of Camps,—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every Beneficiary Certificate is issued only upon the conditions stated in and subject to the Constitution and Laws then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association." (Pl. Ex. 3, 4 R. 65, 66).

Section 107 (g) of the Constitution, Laws and By-Laws of the defendant, adopted June, 1939, which section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws provides:

> "Sec. 109 (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts." (R-66).

The Appellee urged at the trial that Sections 103 and 109 of the 1939 Constitution (Pls. Ex. 5) were of some importance. These sections merely provide that the Financial Secretary for each local camp may be appointed by the President and Secretary of the Society and shall have charge of the accounts and collection from the members and transmit the same to the Society on or before the 5th day of each month after the dues shall have been collected. The authority of the

Financial Secretary is limited by said sections and other provisions of the contract heretofore quoted provide that he cannot waive any provisions thereof and any information which he may have received in the performance of his limited duties could not be imputed to the Society.

About September, 1936, Mr. Krussman failed to pay his current installment. Thereafter, and within the time permitted by his contract he made such payment. He was then in good health and the delinquent payment reinstated his contract which had become automatically cancelled. This occurred a number of times thereafter. All delinquent payments made and accepted prior to June, 1938, become unimportant because up until July 22, 1938, Mr. Krussman remained in good health and the receipt of the overdue payments made thirty days before his illness in each instance reinstated his contract.

On July 19, 1938, Mr. Krussman tendered his check for the June installment (Pl. Ex. G 24 R. 231). It was, of course, received by the appellant with the contractural warranty that he was in good health and would remain so for a period of thirty days thereafter. His contract was then void. On July 22, 1938, he suffered a paralytic stroke from which he never recovered. In July, 1940, he suffered a second stroke and died August 2, 1940. Both strokes were due to cereberal hemorrhage. During this period of two years he was not in good health, but was totally incapacitated (Pls. Ex. 7, R. 131, Pls. Ex. 8, R. 131-2, Pls. Ex. 9, R. 132, R. 277-86) His ill health during this period of time is not denied or questioned by the appellee.

After Mr. Krussman suffered his first stroke no current

payment was thereafter made, except on August 1st, 1940, a check was drawn by the daughter of Mr. Krussman in favor of Morris Sheppard, Treasurer of the Society for July and August installments. This check was received by the appellant August 8, 1940—six days after Mr. Krussman's death.

No officer of the appellant was ever advised of the ill health of Mr. Krussman and none of them had any knowledge or information of this fact until after his proofs of death were submitted (R. 199, 208).

If Mr. Fleming the Financial Secretary of the local camp had any knowledge of Mr. Krussman's ill health he failed to advise the Society and his knowledge pursuant to the terms of the contract could not be "imputed" to the appellant and he could not waive any of the provisions of the contract (Sec. 65).

The appellant was compelled to accept the tender of these delinquent payments under the terms of the contract. They were received for the purpose of reinstatement (R. 220). Each tender came with the warranty that Mr. Krussman was in good health and would remain in good health for thirty days thereafter, and in each instance, after July, 1938, such warranty was untrue, hence the contract never became reinstated and was void on the date of his death (Sec. 65, R. 206, 7).

The theory of the appellee seems to be that because the delinquent payments were accepted the appellant waived the right to insist upon the warranty of good health, and that the knowledge of the Financial Secretary was imputed to the Society; and, notwithstanding the plain provision of the con-

tract, appellee contends the Society became estopped from urging that the contract was void. The trial court found in favor of the appellee.

The Findings of Fact, Conclusions of Law and Judgment appear in the record at pages 49 to 76. Objections to the Findings, Conclusions and Judgment, and a Motion to Strike, Amend and Substitute were filed and submitted to the court by the appellant in which the fundamental position of the appellant is stated (R. 76-89).

This appeal is prosecuted from the Judgment (R. 89, 90). With the notice of appeal, appellant filed its statement of points which further emphasize the issue (R. 295-300).

SPECIFICATIONS OF ERROR

I.

The Court erred in finding and concluding that the acceptance by the Appellant of delinquent payments tendered by and on behalf of the deceased, Eric A. Krussman, in his lifetime constituted a waiver by the Appellant of the provisions of the contract relating to suspension and forfeiture, and in concluding that under the facts in this case Mr. Krussman was never suspended as a member, nor his contract affected and that the question of his reinstatemnt did not arise (R. 44, 45-67-71-73). The conclusions reached in each instance are contrary to the terms of the contract and against the law.

II.

The Court erred in admitting in evidence over the objec-

tion of Appellant, that the same was immaterial, Plaintiffs Exhibit "C," "D" and "F" being circular letters and Plaintiff's Exhibit "D," "F," and "G" being checks referred to therein (R. 159-170) and in making a finding thereon (R. 55, 56). Such exhibits had no effect upon the question of waiver or estoppel, particularly because there was no evidence introduced of any kind or character that the writer of said letters or any of the officers of the Society had any knowledge or information that Mr. Krussman was not in good health by reason whereof and of his delinquent payments said contract was void.

III.

The Court erred in making that part of Finding No. II to the effect that Eric A. Krussman "remained such member in good standing and entitled to all the privileges and benefits appurtenant to said membership until his death which occurred on August 2, 1940," and that portion reciting: "which said certificate of insurance was in full force and effect at the time of his death (R-51), upon the ground and for the reason that in each instance said Finding is not supported by any competent evidence but on the contrary the undisputed evidence is that Eric A. Krussman was automatically suspended for failure to pay during the month of June, 1938, the installment which became due that month, and his certificate became void and was never thereafter reinstated because he never thereafter remained in good health for thirty days and could not have been reinstated.

IV.

The Court erred in making Finding No. VII that "there

is no evidence in the record that any notice or warning of any kind was ever given to the insured that his certificate was not in full force and effect" (R. 56) for the reason that the same is not within the issues of said cause and is immaterial for any purpose and, if true, would not constitute any reason for judgment in favor of the plaintiff, more particularly because the contract between the Society and the member did not require Notice of Suspension, but, on the contrary, the suspension for non-payment of dues was automatic and self-operative and the member was charged with knowledge of such provisions.

V.

The Court erred in making that part of Finding No. XVII whereby it finds "that the insured was not suspended nor was his certificate null and void" and that the payment made on July 21, 1938, and applied on the June, 1938 installment was received and accepted by the defendant for the purpose of continuing in force the insurance certificate," and in finding that "it is not true that after June, 1938, every or any of the payments made by the insured and received by the defendant were made after the certificate terminated and became void and the member suspended" (R. 67), particularly because said statements are contrary to the evidence and to the contract involved and against the law controlling the case.

VI.

The Court erred in finding and concluding that Bazil Fleming was the Agent of the Appellant and acquired knowledge of Mr. Krussman's condition while he was acting within

the scope of his powers and duties (Finding No. XVIII) and in finding that "it is presumed * * * that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant" (R. 69-74) particularly because Fleming had no such powers as an agent and the contract expressly provided that the Secretary of the Society must "have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member." (Sec. 65).

VII.

The Court erred in making Finding No. XIX to the effect that "during the whole of the time that Krussman was in ill health and from the time of the issuance of his certificate of insurance the defendant treated him as a member in good standing and that none of said payments were made for the purpose of reinstatement, and that defendant waived prompt payment of monthly installments, and that none of said payments made to the defendant and retained by it was a guarantee, representation or warranty that the said insured was in fact in good health or that he would remain in good health for any period of time" (R. 70) because said Finding is not supported by any evidence, but is contrary thereto, and contrary to the provisions of the contract, and particularly to those provisions providing that the payment of delinquent installments and their acceptance by the Society was for the purpose of reinstatement as provided in sections of the Constitution, Laws and By-Laws, numered 65, 66 (a) and (b), and such acceptance of delinquent payments did not and could not have constituted a waiver of any rights under the contract,

but that the making of such payment by the insured constituted a warranty of good health, which warranty after July 1938 was false.

VIII.

The Court erred in making Finding No. XX to the effect that the Appellant, in accepting payments after the end of the month in which they became due did not act upon any guarantee, representation or warranty that Mr. Krussman was in good health "and there was no false or untrue warranty" and in finding that knowledge had been imputed to the defendant prior to the death of Mr. Krussman that he was not in good health and that the "retention of payments made after default" and "defendant's course of dealing constituted a waiver of the right of defendant to insist upon prompt payment as in the contract provided and of the right to forfeit or terminate said contract, and could and did constitute an estoppel on the part of defendant to resist payment under the certificate, and finds that said certificate was not void of or no force or effect after the 22nd day of July, 1938, or at any time, but finds that the same was in full force and effect during said time and at the date of the death of the said Eric A. Krussman" (R. 70, 71), because said finding is not supported by the evidence, but is contrary thereto and is against the law and fails to recognize the provisions of the contract respecting the warranty of good health and the necessity on the part of appellant to accept tendered payments by one in default, which payments come with a warranty of good health.

IX.

The Court erred in making Finding No. XXI to the effect

that knowledge on the part of the Financial Secretary, Bazil Fleming, of the health of Eric A. Krussman during the time delinquent payments were made was material and in finding that the receipt of the checks by the Society and the application of the same to overdue monthly installments, and "the course of defendant's dealing with the insured could and did constitute a waiver of the provisions of said contract, and could and did constitute an estoppel of defendant in resisting payment herein, and that the tender made by the said defendant as set out in Paragraph VIII of these findings, was not made upon the erroneous assumption that Eric A. Krussman was in good health" (R. 71), more particularly because said Finding is not supported by any evidence but is contrary thereto and contrary to the provisions of the contract expressed in Secs. 65, 66, 82 and 109 (g) of the Constitution, Laws and By-Laws of the Society.

X.

The Court erred in Finding No. XXII to the effect that: "the sum of $5000.00 is now due thereon from defendant to the plaintiff together with interest * * *" (R. 72) upon the ground and for the reason that the same does not constitute a Finding of Fact and is an erroneous conclusion and is not supported by the evidence in this case, but is contrary thereto.

XI.

The Court erred in each and all of its Conclusions of Law, Numbered III to VIII inclusive (R. 73-75) which are generally to the effect that the payment of delinquent installments

by the insured and their receipt and retention by the Society did not result in a suspension or forfeiture of the contract, even though the insured was in ill health when such occurred and that the Appellant waived and is estopped from insisting upon the enforcement of the provisions of the contract with respect to such matters, and that such knowledge as Bazil Fleming may have had as to the ill health of Mr. Krussman was imputed to the Appellant, notwithstanding the provisions of Sec. 40-2331 I. C. A., and in holding and concluding that the Certificate of Insurance was not forfeited, and that the beneficiary was entitled to judgment as therein recited, particularly because said Conclusions and all of them are contrary to the evidence and against the law.

XII.

The Court erred in overruling "Objections to Findings, Conclusions of Law and Judgment and Motion to Strike, Amend and Substitute" filed and presented by the Appellant for the reasons in each instance therein appearing (R. 76-89).

XIII.

The Court erred in entering Judgment in favor of the Appellee and against the Appellant in the sum of $5,000.00, together with interest thereon at the rate of 6% per annum from the 8th day of August, 1941, until paid, and costs taxed at $29.60 (R. 75, 76) or for any other sum or amount and in not rendering judgment in favor of the Appellant.

XIV.

Generally, the Court erred in failing and refusing to find

and conclude, under the evidence in this case and the law applicable thereto, that the contract sued upon was void on the date of the death of Eric A. Krussman; that there was no waiver of any contractual provision by the Appellant and that the Appellant, under the evidence, was not liable to the Appellee on said contract, and in not entering a judgment in favor of the Appellant.

POINTS AND AUTHORITIES

I.

The application, certificate, constitution, laws and by laws, and all amendments thereto constitute the contract. All provisions therein are binding upon the Society and the member and his beneficiaries. The member is conclusively presumed to know all of the terms of the contract and the nature and effect of each provision contained therein.

Van Dahl vs. Sovereign Camp W. O. W. (Neb.) 264 NW 454;

Whitehorn vs. Royal Arcanum (Neb.) 269 N.W. 821;

Bixler vs. Modern Woodmen of America (Va.) 72 S. E. 704;

Howton vs. Sovereign Camp W. O. W. (Ky.) 172 S. W. 687;

Kennedy vs. Grand Fraternity (Mont.) 92, Pac. 971;

Pope vs. Royal Highlanders (Neb.) 164 N. W. 1047;

Wirtz vs. Sovereign Camp (Tex.) 268 S. W. 438;

Modern Woodmen vs. Seargeant (Ark.) 69 S. W. (2) 397;

Soverign Camp vs. Newson (Ark.) 219 S. W. 759;

National Council vs. Smiley (Fla.) 100 So. 153;

Sovereign Camp vs. Wheeler (Ga.) 146 S. E. 917;

Stark vs. Sovereign Camp (Ky.) 225 S. W. 1063;

Day vs. Supreme Forest (Mo.) 156 S. W. 721;

Fowler vs. Sovereign Camp (Neb.) 183 N.W. 550;

Fairbanks vs. Sovereign Camp (Neb.) 266 N. W. 60.

II.

The appellant operates under Idaho statutory authority governing Fraternal Benefit Societies. A member is both insurer and insured. He is charged with full knowledge of his contract. The Statute establishes public policy of the state and the provisions of the contract and limitations against any waiver by Financial Secretary have statutory sanction and cannot be disregarded by the courts.

Session Laws Idaho 1911, Chapter 225;

Chapter 23 Title 40, I. C. A. 1932. See particularly sections 40-2303, 40-2309 and 40-2331, I. C. A. 1932;

Sovereign Camp W. O. W. vs. Moraida (Tex.) 113 SW (2) 177;

Woodmen of the World vs. McHenry (Ala.) 73 So. 96;

Sovereign Camp vs. Hart (Ga.) 200 SE 296;

Perry vs. Sovereign Camp (SC) 174 SE 397;

Beiser vs. Sovereign Camp (Ala.) 74 So. 235.

III.

In the case at bar the contract required the payment of monthly installments in the month for which the installment became due and if not so paid the member became automatically suspended and his certificate became void. These provisions are self-operative and automatic and no notice of suspension or forfeiture is necessary.

Whitlow vs. Sovereign Camp (Iowa) 202 N. W. 249;

Summerlin vs. American Fraternal Stars (Mich.) 167 N. W. 844;

Locomotive Engineers vs. Thomas 206 Fed. 409;

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

Sovereign Camp vs. Anderson (Ark.) 202 S. W. 698;

National Council vs. Smiley (Fla.) 100 So. 153;

Sovereign Camp vs. Hart (Ga.) 200 S. E. 296;

Munger vs. Brotherhood (Ia.) 154 N. W. 879;

Howton vs. Sovereign Camp W. O. W. (Ky.) 172 S. W. 687;

Barganier vs. K. O. M. (La.) 85 So. 57;

Koehler vs. Modern Brotherhood (Mich.) 125 N. W. 49;

Balough vs. Supreme Forest (Mich.) 280 N. W. 83;

House vs. Grand Lodge (Tex.) 48 S. W. (2) 674.

IV.

Physical or mental disability does not excuse failure to pay in accordance with provisions of contract nor prevent forfeiture for failure to pay as therein required.

Hawkshaw vs. Supreme Lodge 29 Fed. 770;

Whitlow vs. Sovereign Camp (Ia.) 202 N. W. 249;

Bost vs. Supreme Council (Minn.) 92 N. W. 337;

Smith vs. Sovereign Camp (Mo.) 77 S. W. 862.

V.

The contract in the case at bar provides that a member who fails to pay his installment during the month for which same became due becomes automatically suspended and his certificate becomes void. He had a right, however, to pay delinquencies within three months under Section 65 of the Con-

stitution until amended effective September 1st, 1939, and within fifteen days thereafter. The Society was obliged to accept these tenders. They came, however, with a warranty that he was in good health and would remain so for thirty days thereafter and if the warranty was false the certificate was not reinstated. The acceptance of such payments could not constitute a waiver or estoppel (Secs. 63 a, 65 and 66 R. 61-66, 119-123). These provisions are binding upon the parties.

Corpus Juris Vol. 45 pages 145-7;

White vs. Sovereign Camp W. O. W. (S. C.) 192 S. E. 161;

Bixler vs. Modern Woodmen of America (Va.) 72 S. E. 704;

Tatro vs. Modern Woodmen of America (Ill.) 2 N. E. (2) 107;

Lester vs. Sovereign Camp W. O. W. (Tenn.) 110 S. W. (2) 471;

Kennedy vs. Grand Fraternity (Mont.) 92 Pac. 971;

Pickens vs. Security Benefit Assn. (Kas.) 231 Pac. 1016;

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

United Order vs. Betts (Ark.) 14 S. W. (2) 1108;

Valentine vs. Head Camp (Cal.) 180 Pac. (2);

Adams vs. Grand Lodge (Neb.) 92 N. W. 588;

Soverign Camp vs. Cameron (Tex.) 41 S. W. (2) ~~832~~ 283

Van Dahl vs. Sovereign Camp (Neb.) 264 N. W. 454;

Supreme Lodge vs. Grijalva (Ariz.) 235 Pac. 397.

VI.

The Financial Secretary, while appointed by the President and Secretary of the Society is nevertheless an officer of the local lodge, with limited authority. He has no power to waive any of the provisions of the contract, and even though he may know of the illness of a delinquent member and accepts delinquent installments such cannot constitute a waiver or an estoppel or reinstate a void contract.

Sec. 40-2331 I. C. A. 1932;

Sovereign Camp W. O. W. vs. Cameron (Tex.) 41 S. W. (2) 283;

Sovereign Camp W. O. W. vs. Moraida (Tex.) 113 S. W. (2) 177;

Sovereign Camp W. O. W. vs. Thacker (Tex.) 118 S. W. (2) 1086;

Smith vs. Sovereign Camp W. O. W. (Mo.) 77 S. W. 862;

Modern Woodmen of America vs. Tevis, 117 Fed. 370;

Kiker vs. Sovereign Camp W. O. W. (Ala.) 167 So. 313;

Valentine vs. Head Camp (Cal.) 180 Pac. 2;

Koehler vs. Modern Brotherhood of America (Mich.) 125 N. W. 49;

Salter vs. Security Benefit Assoc. (Kas.) 243 Pac. 1033;

Lester vs. Sovereign Camp (Tenn.) 110 S. W. (2) 471;

Sovereign Camp vs. Gay (Ala.) 93 So. 559;

Havlicek vs. Western Bohemian (Minn.) 163 N.W. 985;

Sovereign Camp W. O. W. vs. Hart (Ga.) 200 S. E. 296;

Sweatman vs. Masons of Texas (Tex.) 33 S. W. (2) 528;

Day vs. Supreme Forest (Mo.) 156 S. W. 721;

Whitehorn vs. Royal Arcanum (Neb.) 269 N. W. 821;

Yarbrough vs. Sovereign Camp W. O. W. (Ala.) 97 So. 654;

Beiser vs. Sovereign Camp (Ala.) 74 So. 235.

VII.

Even though a custom may be proved of accepting delinquent payments within the grace period, yet these payments are necessarily for reinstatement and their acceptance does not reinstate the policy if the member is not in good health.

Supreme Lodge vs. Grijalva (Ariz.) 235 Pac. 397;

Tatro vs. Modern Woodmen (Ill. Appeals) 2 N. E. (2) 107;

Van Dahl vs. Sovereign Camp (Neb.) 246 N. W. 455;

Lester vs. Sovereign Camp (Tenn.) 110 S. W. (2) 471;

United Moderns vs. Pike (Mo.) 76 S. W. 774;

Sovereign Camp W. O. W. vs. Muller (Ga.) 11 S. E. (2) 92.

VIII.

This case does not present a question of whether or not the appellant through its officers might waive provisions of its contract. There are no facts herein which were known to the officers upon which a waiver or estoppel could be legally predicated. The appellant did only that which the contract required, the doing of which cannot constitute a waiver or estoppel.

Sovereign Camp W. O. W. vs. Moraida (Tex.) 113 S. W. (2) 177;

Tatro vs. Modern Woodmen of America (Ill.) (2) N. E. 107;

Order of United Commercial Travelers vs. Belue 263 Fed. 502.

I.

ARGUMENT

All provisions of the contract are binding upon the member and his beneficiary and upon the society. The member is conclusively presumed to know the terms of the contract and the effect of each provision. If monthly installment is not paid a member becomes automatically suspendd and the certificate becomes void. These provisions are self-operative and automatic and no notice of forfeiture is necessary. Delinquent payments are made for the sole purpose of reinstatement and with a warranty that the member is in good health and will remain so for thirty days thereafter. The acceptance of such payments, without actual knowledge by the secretary or other corporate officer of the society of the mmber's ill health, cannot constitute a waiver or estoppel.

Specifications of Error Numbered I to XIV inclusive and the authorities cited under Points and Authorities Numbered I to VIII inclusive.

The trial court seemingly predicated its ruling upon the theory that because the Appellant accepted delinquent payments tendered by Mr. Krussman it led the member to believe that the contract was in good standing and thereby it waived the provisions of the contract relating to forfeiture and reinstatement, and that the knowledge of the Financial Secretary was imputed to the Society, and therefore the contract never became terminated or forfeited (R. 41-49). The contract itself is a complete answer to this position. A party to a contract cannot be estopped nor held to have waived its rights by doing that which the contract requires.

Sec. 63 of the Constitution, Laws and By-Laws definitely provides that a failure to make a payment within the month for which the same becomes due renders a Certificate void. Sec. 65 gives the member a positive right to reinstate his contract by payment of delinquencies within the time therein recited, provided he is in good health and remains so for thirty days. The Society had no right to refuse any payments made before Mr. Krussman's illness in July, 1938, because he had a right to make such payments, and being in good health his contract was automatically reinstated. After he became ill the Society may have refused the payment had it known of his illness (a matter not now necessary to discuss), but this knowledge was not possessed by any officer of the Society and was not imputed to the officers by information if any, which the Financial Secretary may have acquired, and he was unable to waive any provision of the contract. This is definitely provided in Sec. 82 and Sec. 107 (g) of the Constitution, and appears in prominent type on the face of the Certificate. This contractual restriction has Idaho legislative sanction in Sec. 40-2331 I. C. A. 1932.

The appellant is a corporation organized solely for the mutual benefit of its members and their beneficiaries and not for profit. It has a lodge system and a ritualistic form of work and a representative form of government (R. 198). The members of the Society adopt the Constitution, Laws and By-Laws. By this method they grant and restrict authority to the respective officers and agents and generally prescribe the method of transaction of business. In reality the member is both the insurer and the insured.

The character of the contract and the method of doing business has definite legislative sanction in Idaho. In 1911 the Legislature of the State of Idaho enacted Chapter 225, providing for the organization and conduct of the business of fraternal benefit societies of the type and character of the defendant. This Act was approved March 13, 1911, and with few amendments, is now Chapter 23, Title 40 of the Idaho Codes Annotated.

Sec. 40-2309 provides that the Constitution and Laws of the Society and all amendments thereto shall form part of the agreement between the Socity and the member, and Sec. 40-2331 authorizes the provision that no subordinate officer shall have power or authority to waive any of the provisions of the Laws and Constitution of the Society, and that the same shall be binding on each member of the Society and all beneficiaries of membrs, thus we have a definite legislative policy prescribed and to which reference will be made in certain cases hereafter cited.

In the case at bar Mr. Krussman became a member and received his Certificate in 1935. He agreed to pay his insurance premiums in monthly installments. He began to fall in arrears in his payments while still in good health, but paid such delinquencies within the time permitted by his contract. He failed to pay his installment in June, 1938, until July 19th. He became ill July 22, 1938, and thus the installment so tendered was ineffective because he did not remain in good health for thirty days. He never regained his health and the payments thereafter made were accepted by the Society without knowledge of his ill health. He died August 2, 1940, and his proofs

of death revealed the fact that he had been ill for two years. The Society, in fairness to all other members, had no alternative but to reject the claim because the Certificate was and had been void since July, 1938. The Society tendered back all payments made from July, 1938, to the date of his death (Def. Ex. 21, R. 287).

The authorities definitely sustain the Appellant's position. We shall review only a few of them, but many more are cited in Points and Authorities, supra.

The cases hereafter reviewed are based on contracts identical or very similar to the one involved in the case at bar.

A case very much in point is Van Dahl vs. Sovereign Camp W. O. W. (Neb.) 264 N. W. 454. In this case suit was brought to recover upon a Certificate of the same character as the one involved in the case at bar. There had been failure on the part of the member to pay monthly installments as and when the same became due, but the payments were accepted by the Society after the member had become automatically suspended. The trial court rendered judgment for the beneficiary, but judgment was reversed by the Supreme Court of Nebraska. In this case it is held:

> "Articles of Incorporation, Constitution Laws and By-Laws of fraternal benefit association, application for membership and certificate constitute contract between Association and beneficiary certificate holder."

Also:

> "By-Laws of beneficial association providing for payment of assessments made during month on certain day and for suspension without notice of members in

default are self-executing and provide reasonable and necessary penalty for enforcement of payment of assessments to fraternal insurance fund."

Also:

"Member of fraternal benefit association who had been suspended for nonpayment of assessments, can be reinstated only in strict conformity with By-Laws in force at time of reinstatement, and has no rights under his certificate until actual reinstatement has taken place."

Also:

"Where Constitution and By-Laws of fraternal benefit association provided that members suspended for non-payment of assessments could be reinstated within three months by paying delinquent assessments to date, and that such payments should be held to warrant that member was then in good health and would remain so for thirty days, Association held not liable for death benefit when certificate holder died within thirty days after payment of delinquent assessments."

Also:

"Proof of practice of fraternal benefit association in accepting payments for purposes of reinstatement after member was automatically suspended for nonpayment of assessments, held not to establish course of dealing or custom to accept such payments which would estop association from asserting forfeiture on ground that holder was not in good health at time of payment or had failed to remain in good health for thirty days thereafter."

After the decision in the Van Dahl case, this matter came before the Nebraska Court again in the case of Whitehorn vs.

Royal Arcanum, (Neb.) 269 N. W. 821, in which the Van Dahl case is quoted at length with approval. In the Whitehorn case it is held:

> "By-Laws of fraternal benefit association providing for payment of assessments monthly and for suspension if assessment is not made are self-executing."

Also:

> "Suspended member of fraternal benefit association can only be reinstated in strict conformity to by-laws, and has no right under Certificate until so reinstated."

Also:

> "Fraternal benefit association held not liable on benefit certificate on theory of waiver, where, after member was suspended for non-payment of assessment, he sent check to collector of local council, which collector retained until after member's death."

In the case of Tatro vs. Modern Woodmen of America, (Ill.) 2 N. E. (2d) 107, the defendant's illness and its effect is considered. In this case it is held:

> "Fraternal beneficiary society's receipt of suspended member's dues in ignorance of his illness does not constitute a waiver of requirement of good health at time of reinstatement."

Also:

> "Warrant, at time of reinstatement of suspended member of fraternal beneficiary society, that member is in good health, when in fact he is not, will vitiate reinstatement."

> "Insurance contracts are essentially of good faith and fact that member of fraternal beneficiary society might have been reinstated upon payment of delinquent assessments upon previous occasion should not give rise to right to work fraud upon insurer upon subsequent attempted reinstatement at time when insured is not in good health."

In the case at bar it is significant to note that while some checks by which the delinquent payments were tendered were sometimes written to the treasurer of the Appellant, or to the Appellant in its corporate name, there was never a statement accompanying any of said checks advising of Mr. Krussman's illness. In other words, these tenders were made for reinstatement with the contractual warranty that he was in good health and each time, from July, 1938, said warranty failed. The Tatro case further holds:

> "Burden of proving waiver, by fraternal beneficiary, society of requirement that suspended member be in good health at time of reinstatement, it upon one seeking to avail himself thereof."

In the case of White vs. Sovereign Camp W. O. W. (S. C.) 192 S. E. 161, the deceased referred to therein was a member of said Society and held a benefit certificate of the same type and character as the one in the case at bar. Some of the same sections quoted in this brief are quoted in this opinion. Mr. White fell into arrears with his payments. One of the defenses asserted by the Society in a suit on the certificate was that the member had been automatically suspended and was not in good health when his last payments were tendered. It was argued that the society had waived the right to insist upon the

provisions of its Constitution, Laws and By-Laws and was estopped in holding against the contention of the beneficiary. In disposing of this contention, the South Carolina Court, on Page 166, says:

> "Under the contract of insurance the insured had the right to pay up these dues and become reinstated, conditioned, however, upon the warranty that he is in good health at the time of the payment of same and would remain in good health for a period of thirty days. The insurer, appellant herein, had the right to accept said dues—*more than that, was compelled to accept said dues or assignments, but was protected by the contract to the extent that the acceptance and retention by it of these dues was not a waiver of the condition that the insured was in good health and would remain in good health for a period of thirty days thereafter.* Except for the provision in the contract, the acceptance and retention of these dues would be some evidence of waiver on the part of appellant; and the acceptance and retention of the assessments and dues, or premiums from the insured, paid irregularly and after the month for which they were due, from the time that the insured became a member of appellant, might be some evidence of waiver on the part of appellant, except for the fact that the insured had the right to pay when he did and become reinstated subject to the provisions of the contract, and appellant could not have refused these payments."

> "Section 65 of the Constitution, Rules and By-Laws of appellant, made a part of the contract of insurance, provides that when a person becomes suspended for the nonpayment of dues and pays up such dues, the appellant may receive and retain same without waiving any of the provisions of the contract until such time as the secretary of the association shall have received *actual, not constructive* or imputive knowledge that the person was not in fact in good health

> when he attempted to again become a member.* * *'' (Italics ours).

So, in the case at bar, the appellant was required by the very terms of its contract to accept these delinquent payments, even though it knew they were in payment of past due installments. They came with a warranty that the member was in good health, and under an agreement in the contract that the retention of such installments should not constitute a waiver of any of the provisions of the contract, or an estoppel upon the Society (R. 206-7).

In the case of Bixler vs. Modern Woodmen of America, (Va.) 72 S. E. 704, it is held:

> "One who takes out a policy in a mutual benefit society becomes a member thereof and is bound by its charter and by-laws made in pursuance thereof, and is chargeable with knowledge of the limitations of the powers of agents of the society, found in the By-Laws."

It is also held in this case:

> "The By-Laws of a mutual benefit society provided for the reinstatement of a suspended member by his payment of assessments, if he was at the time of payment in good health; that otherwise the receipt and retention of the assessments should not reinstate him and prohibited the clerk of any local camp from knowingly receiving assessments from a suspended member, if at the time of tender of payment member was in impaired health. A member who had been suspended for non-payment paid arrearages while ill, and the clerk of the local camp who received the money had knowledge thereof. None of the directors or other officers of the society knew of member's payment until

> after his death. *Held* that the payment and reception thereof by the clerk of the local camp did not reinstate the member, and the society did not waive the forfeiture and was not estopped from setting it up as a defense."

In the case of Howton vs. Sovereign Camp of Woodmen of the World (Ky.) 172 S. W. 687, it is held:

> "The provisions of the constitution of a fraternal benefit order by the terms of its certificate of insurance constituting material parts thereof, were binding upon the insured and the beneficiaries."

The case of Modern Woodmen of America vs. Tevis, 117 Fed. 369, was decided by the Eighth Circuit Court of Appeals. It very pointedly decides that a member of a fraternal benefit society is bound to know the provisions of his benefit certificate. The court holds:

> "A principal may limit the authority of his agent, and when he does so the latter cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations upon his power."

Also:

> "The insured and the beneficiaries under contracts with insurance companies and beneficial associations are charged with knowledge of the limitations upon the powers of the agents of the companies which are found in the policies or certificates or in the by-laws or applications which are part of their contracts, and they are bound by these limitations."

The case also definitely holds that a fraternal benefit

society has the right to circumscribe and limit the powers of any of its agents, including the local secretary, and that the member is definitely charged with knowledge of these limitations.

In Lester vs. Sovereign Camp, W. O. W., (Tenn.) 110 S. W. (2) 471, suit was instituted upon a certificate identical with the one involved in the case at bar. The member had become delinquent in the payment of a number of his monthly installments and after his death suit was instituted for recovery under the certificate. The defense asserted is exactly the same as that asserted in the case at bar. A number of the provisions of the Constitution, Laws and By-Laws are quoted in the opinion, particularly Sec. 63 (a), (b) and (c); Sec. 64; Sec. 65; Sec. 66 (a) and (b); Sec. 67; Sec. 68; Sec. 109 (g); and Sec. 111. The Tennessee Court held:

> "Under By-Laws of mutual benefit association which provided for reinstatement of member, provided member was in good health, association which had accepted monthly assessments after their due date while member was in good health was not estopped to deny liability on benefit certificate for member's failure to pay monthly installments before the last day of the month, where installments for the month preceding month in which he died were paid a couple of days after his death."

We suggest that the second stroke of Mr. Krussman occurred about July 22, 1940. His July payment had not been made. It was on August 1, 1940, that a member of his family wrote out a check for the July payment, which was already delinquent, and the August payment (Pls. Ex. G. 49, R. 236).

Mr. Krussman died August 2, 1940. The fact that the August payment was included in this check is significant. It clearly asserts knowledge on the part of the one who paid of the terms of the contract requiring current payments to be made. The Lester case further holds:

> "Mutual benefit association's acceptance of monthly assessments after their due date, while member was in good health, as authorized by its By-Laws did not estop association from denying liability on benefit certificates for failure to pay installments before due date, on ground that insured had been led to believe that association would accept installments in arrears after member became ill or from friends after his death."

This case positively negatives the theory of the Appellee that the member was led to believe delinquent payments would be accepted with like effect as if paid on time and that the contract had not been forfeited.

The Lester case cites and relies upon the case of Pickens vs. Security Benefit Association (Kas.) 231 Pac. 1016, 48 A. L. R. 662. The Pickens case clearly points out that a custom of receiving installments after the months in which they are due and while member is in ill health, without knowledge on the part of the officers of the society, is quite different than if such payments had been received by the officers of the society with actual knowledge of the ill health of the member. It is not contended in the case at bar that the officers had any information of Mr. Krussman's ill health until after he died. The most the appellee urges is that the local financial secretary may have had such information. This, as we will argue

later, even if true (which it is not necessary to admit) would not bar the society.

In Sovereign Camp W. O. W. vs. Cox (Ala.) 127 So. 847, it is held that:

> "Failure of member of fraternal benefit order to pay monthly dues worked automatic suspension where Constitution and By-Laws, made part of the contract of insurance, so provided."

Also:

> "Parties are presumed to know the provisions of the contracts and by-laws made part of the insurance contract."

and that:

> "mutual benefit association was presumed to have received and retained money paid for insured reinstatement in accordance with provisions permitting reinstatement."

So, in the case at bar it will be observed that the receipt and retention of all delinquent payments are necessarily presumed to be in accordance with the terms of the contract and not otherwise, and accordingly the member could not have been mislead by paying delinquent installments.

In the case of Koehler vs. Modern Brotherhood of America (Mich.) 125 N. W. 49, it is held that:

> "The fact that out of 17 assessments paid by the insured 12 had been accepted, though paid after the required date, does not amount to a course of conduct on the part of the insurer which will estop the insured from

claiming a forfeiture for want of prompt payment of a subsequent assessment."

This case also holds:

"Where a condition for reinstatement to a mutual benefit association after suspension was that the member be in good health, the local secretary could not waive the condition by accepting the dues of a suspended member while he was in a dying condition."

In Pope vs. Royal Highlanders (Neb.) 164 N. W. 1047, it is held:

"In a fraternal mutual benefit insurance association the application for membership is the certificate of insurance, and the By-Laws of the society constitute the contract between the insured and the society and all are to be construed together and considered with other evidence in the case to determine the rights of the respective parties."

Also:

"Where a person voluntarily becomes a member of such association, he thereby assents to and is bound by the laws under which his membership is acquired."

Further stressing the point that the failure to pay an assessment when due forfeits the contract without affirmative action on the part of the society, we cite the case of Whitlow vs. Sovereign Camp W. O. W. (Iowa) 202 N. W. 249. This case holds:

"Where by by-laws of association, failure to pay assessments on benefit insurance certificate works for-

> feiture of certificate, failure to make such payments renders policy void without any declaration or affirmative act on part of association."

Also:

> "Physical or mental disability does not excuse failure to pay assessments on benefit certificate, which is self-forfeiting for failure to make such payments."

In the case of Sovereign Camp vs. Hart (Ga.) 200 S. E. 296, many of the foregoing propositions of law are again considered. In this case Mr. Hart became a member of the lodge in December 1934. His certificate required that he pay his installments on or before the last day of each month. He paid on time for a few months. The April installment, however, was paid May 2nd, 1935. The May installment was paid June 4, 1935. The June installment was paid July 8, 1935. The July installment was paid August 7, 1935. The August installment was paid September 10, 1935. Mr. Hart died October 13, 1935. All payments were made to the financial secretary who knew that they were overdue. The society refused payment on the ground that the policy had never been reinstated and was void. Excerpts from the constitution, laws and by-laws of the society are quoted in the opinion. The plaintiff in this case urged that there had been an estoppel and a waiver. The court held:

> "Where benefit certificate provides that Articles of Incorporation, Constitution, Laws and By-Laws of fraternal benefit association shall constitute the agreement between the association and the member, provisions of constitution, laws and by-laws relating to payment of dues and waiver thereof and suspension

for nonpayment of dues are b i n d i n g upon the member."

Also:

"Where constitution, laws and by-laws of benefit association provided for suspension of member for nonpayment of dues, the member became suspended upon the failure to timely pay the dues, by operation of the terms of the contract without affirmative or judiciary action by the association."

This case also holds:

"Where constitution, laws and by-laws of fraternal benefit association provided for suspension of member for nonpayment of dues, and provided for reinstatement by payment of back dues while member was in good health, and provided that association's retention of installments paid to reinstate suspended membership would not estop the association, that financial secretary, who accepted series of late payments of members' dues, falsely reported member as paying on time, did not estop the association to insist on strict terms of the contract upon death of member occurring when dues for month in which he died were unpaid."

The Hart case is further instructive in dealing with the distinction between a contract issued by a life insurance company which does not have the provisions in the contract contained in the case at bar, and a contract of the character under consideration. On Page 299 the Georgia Court, in dealing with this point says that where an insurer by custom and course of dealing with the insured, accepts without objection past due premiums when he could have insisted upon a forfeiture, it may be considered that such induced the belief on

the part of the insured that premiums received after they became due and within a reasonable time would be accepted, yet the Georgia Court says such is not the law in a case like the one under consideration, where the certificate, constitution, laws and by-laws form the contract and expressly provide that if a member "fails to make any such payments on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void." The court further says: "such provisions are binding upon the insured member" and consequently the doctrine of waiver or estoppel has no application. A consideration of this distinction relieves the case of many of the authorities relied upon by the Appellee.

It will be seen from the foregoing authorities and many others cited elsewhere in this brief that the appellant was required to accept Mr. Krussman's delinquent payments because the contract so provided. This, however, did not prevent suspension or voiding the contract. Such acceptance was a right he had to insist upon for reinstatement and so long as he was in good health such reinstatement occurred. When, however, he was in ill health such reinstatement could not occur, hence his certificate remained void. Mr. Krussman could not avoid knowledge of the provisions of his contract and the acceptance of these payments could not possibly prevent reinstatement, when he was in good health, else all of these provisions of the contract are meaningless.

But, the Appellee will urge that the Appellant treated him as a member and led him to believe he was a member, particularly in writing him the letters referred to in Specifications of Error No. II. This argument is without weight because there

is no showing that the officer of the company who signed and mailed such circular letter to Mr. Krussman had any knowledge of his ill health. The receipt of his delinquent payments were for reinstatement and if in good health he was reinstated. The transmission of letters and the refund check, therefore, could possibly have no effect when the officer who sent it knew nothing of his state of health, particularly because of these delinquent payments coming with a warranty that he was in good health and such officer had a right to rely upon the warranty and if it failed, as it did in the case at bar during the last two years of Mr. Krussman's life, then the contract remained void.

II.

The Financial Secretary has no power to waive any of the provisions of the contract and such knowledge, if any, as he may have possessed could not be imputed to the Secretary or other officer of the Society.

Specifications of Error Numbered V, IX and XI, and the authorities cited under Points and Authorities Numbered II, VI and VII.

It was urged by the Appellee and found by the trial court, erroneously we contend, that the Financial Secretary of the local lodge, Mr. Bazil Fleming, had knowledge of Mr. Krussman's illness and with such knowledge collected delinquent installments, which it is contended, constituted a waiver, or an estoppel. There is no evidence that Mr. Fleming ever communicated the ill health of Mr. Krussman to the officers of

the Appellant. As a matter of fact, the officers of Appellant had no such knowledge until proofs of death were submitted (R. 208). The contract expressly provides that delinquent payments must be received and retained by the Appellant until the Secretary of the Appellant (not the financial secretary of the local lodge) "shall have received actual, not constructive or imputed, knowledge" that the person was not in good health when he attempted to again become a member. In the face of this clear provision of the contract the Court found that Bazil Fleming had knowledge of Mr. Krussman's ill health and that it was presumed "that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant." This finding disregards the contractual and statutory provisions hereinafter referred to. The Financial Secretary is an officer of the local lodge. While it is true the Appellant has the right to name him and prescribe some of his duties, yet it is always to be remembered that he is one of a local group and for protection of the entire membership of the society his duties and rights are necessarily limited and controlled. There are 350,000 insured members of this Society (R. 182). To permit payment of delinquent installments when in good health relieves such member of physical examinations but the Society has a right to insist and rely upon the warranty of good health by one who tenders a delinquent payment. To guard against possible abuse it has been wisely provided that the local or financial secretary cannot waive any contractual provisions and knowledge of ill health of a delinquent member cannot be *imputed* to the Society.

Sec. 40-2331 I. C. A. 1932, which was enacted in 1911,

and which has direct reference to fraternal benefit societies of the exact character of the defendant provides:

> "The Constitution and Laws of the Society may provide that no subordinate body, nor any of its subordinate officers or members, shall have power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and upon all beneficiaries of members."

On the face of the Certificate delivered to Mr. Krussman appears the following:

> "IMPORTANT. No camp officer thereof, nor any officer, employe or agent of the Association has authority to waive any of the conditions of this Beneficiary Certificate or of the Constitution, and Laws of this Association" (R. 7-8).

This Certificate further provides:

> "Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act of any camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract."

Sec. 82 (a) of the Constitution, Laws and By-Laws also provides that no officer or employee or member of any sovereign or local camp shall have the power or authority to waive any of the provisions of the contract and that knowledge of any such officer or employee of any fact or condition shall not constitute a waiver of the provisions of the contract or an estoppel of the Association.

Sec. 109 (g) of the Constitution provides:

> "The financial secretary shall not, by acts, representations or waivers, nor shall the camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the constitution, laws and by-laws of this society, nor bind the society by any such acts."

In the light of these statutory and contractual provisions it seems wholly illogical and unreasonable to say that a financial secretary could collect delinquent dues and obtain knowledge of the member's ill health, and, to shield the member, fail to make report of such conditions and then have such knowledge imputed to the Society. Such is not the law, as is clearly evidenced by the authorities hereafter recited.

In the case of Sovereign Camp, W.O.W. vs. Cameron, (Tex) 41 S.W. (2) 283, it is held:

> "Knowledge, if any, by local clerk of insured's sickness held not binding upon fraternal beneficiary association where clerk had no authority to waive anything when accepting installments after forfeiture."

The case of Sovereign Camp, W.O.W. vs. Moraida (Tex) 113 S.W. (2d) 177, is an extremely enlightening case on this point. Here the deceased had an insurance certificate identical with the one under consideration. He became a member of the Society on April 24, 1931. After becoming a member he paid his monthly dues regularly for a short time. He then began to fall into arrears, as did Mr. Krussman. The following is quoted from the opinion:

"Beginning with the payment required before the last day of August, 1931, he paid the same on September 8, 1931, and uniformly thereafter, up to and including the last payment made before his death, which occurred on February 16, 1933, such payments were not paid before the last day of the month in which they accrued, but were each paid in the next month succeeding their accrual. The payments were usually so paid by him around the fifth, sixth and as late as the eighteenth day of the succeeding month. Without a break in their sequence eighteen of such payments were made, including the two for December, 1932 and January, 1933, which were made respectively, for December, 1932 on January 7, 1933, and January, 1933 on February 4, 1933. It further appears that Moraida became sick about December 5, 1932, and that his illness was continuous from such time until his death on February 16th next. The assessments were paid to Gonzales, the financial secretary of the local camp, who knew of the insured's illness when he received the past due payments in January and February above referred to. The undisputed testimony discloses that the secretary always permitted members of the local camp to pay their dues monthly for the preceding month any time during the succeeding month prior to the date on which he sent his report to the Grand Lodge; and that he told Moraida he would be in good standing if he paid his assessments and dues before the Secretary sent his report to the Association."

After Moraida died his widow instituted this suit to collect on said certificate. She took the position that the defendant had waived provisions of the contract requiring prompt payment and had become estopped to assert that the contract had been forfeited, particularly because of the knowledge of the finan-

cial secretary. We have here the identical issues raised in the case at bar. The Texas Court held:

> "The knowledge of the financial secretary of a local camp of a fraternal beneficiary association with respect to the ill health of a member at the time of acceptance of delinquent assessments, acquired while secretary was engaged in the dischage of his official duties as collector for the camp, was not imputed to the association, so as to preclude the association from denying liability under provisions of its constitution and by-laws.
>
> "The Legislature was authorized to empower fraternal benefit societies to require by their constitution and laws that no subordinate body or its officers should have power to waive any provisions of the laws and constitution of the society, and effect of statute could not be thwarted by judicial decree through estoppel.
>
> "Under constitution and laws of fraternal beneficiary association prohibiting any local secretary from waiving provisions of the constitution and by-laws and providing that payment by member of a delinquent assessment while not in good health should void the policy, association, one of whose local financial secretaries accepted delinquent assessments while member was in ill health, without knowledge of association, was not estopped to deny liability."

It is apparent from the foregoing cast that if Mr. Fleming acquired any information as to the ill health of Mr. Krussman it became wholly unimportant in this case because it was never conveyed to the officers of the Appellant and their acceptance thereafter of delinquent payments would be presumed for rein-

statement and came with a warranty of good health, which warranty, if false, nullified the effect of the payment.

It is to be observed that the Moraida case is predicated upon a statute identical with Sec. 40-2331 I.C.A. 1932. The Texas Court refers to the Texas Statute and to Sections 109, 66, and 65 of the Constitution, which we have heretofore quoted. The Texas Court then said:

> "Mrs. Moraida contends that since the financial secretary of the local camp received and sent the installments of local dues for the months of December and January to the secretary of the association which received and retained same without protest until it received information of Moraida's death, it (the association) thereby waived and became estopped to urge as a defense against liability the provisions of the constitution, laws and by-laws of the association above pointed out; and further that the practice and custom of the local camp in so receiving and forwarding to the association the past-due payments led the insured to believe that prompt payment according to the provisions adopted by the association would not be required, and that such practice and custom amounted to the making of a new contract between the parties. The Court of Civil Appeals in affirming the judgment of the trial court in effect so held. The principal ground for its holding is to the effect that knowledge of the financial secretary of the local camp acquired while engaged in the discharge of his official duties as collector for the camp is as a matter of law imputed to the association.
>
> "The holding is in our opinion erroneous, in that its effect is to nullify the provisions of the constitution, laws and by-laws of the assocation obviously adopted by the association and agreed to by its membership for the purpose of guarding against such claims as that asserted in the present case. One of the specific pur-

poses for which they were adopted is to prevent the restoring to membership of a suspended person in ill health when such fact is unknown to the association, and to prevent reinstating him in a manner prohibited by the laws of the association governing membership and its privileges. Finally, the effect of the holding is to nullify and render of no avail the power conferred by the Legislature by Article 4846 authorizing the association to provide that neither the subordinate body nor any of its subordinate officers or members *shall have the power* to waive any of the provisions of its laws, and authorizing it to specifically require that such provisions 'shall be binding on the society and each and every member thereof and on all beneficiaries of members.' The Legislature was not without power to grant to fraternal benefit societies the authority conferred by Article 4846, and the exercise of such power cannot lawfully be thwarted by judicial decree in the light of the facts herein, stipulated by the parties. Sovereign Camp, Woodmen of the World vs. Cameron, Tex. App. 41 S.W. 2d 283, writ refused. Clearly neither the financial secretary of the local camp nor the camp itself could by their knowledge or acts do that which both were without power to do and which the deceased member had agreed they were without power to do."

Shortly after the decision of the Moraida case the Texas Court of Appeals decided the case of Sovereign Camp, W.O.W. vs. Thacker (Tex.) 118 S.W. (2) 1086. In this case the Court held:

"Under the provisions of the Constitution and laws of fraternal benefit association that certificate should be void for nonpayment of premiums, that payment of delinquent assessment by member would be retained without waiver of right to avoid certificate until actual notice to association that member was in good health

> at time of payment, and that payment of delinquent assessment by member not in good health would avoid policy, and under provisions of Certificate that no officer of local camp of association could waive conditions of certificate or constitution and laws, acceptance of delinquent assessment by financial secretary of local camp of association when member was not in good health and receipt of such payment and retention thereof by home office until after death of member without actual notice of the condition of health of member at time of payment did not waive right of the association to forfeit certificate for non-payment of premium."

In this case attention is particularly called to the fact that the contract as set out therein is identical with the one in the case at bar. The defense is substantially the same and the holding of the Court is as we contend it should be in the instant case.

In Woodmen of the World vs. McHenry (Ala.) 73 So. 97 the same propositions of law are considered. In this case it is to be observed that Alabama, in 1911, adopted the same Act as was adopted by Idaho in the same year for the regulation and control of fraternal benefit societies. Sec. 20 of that Act is exactly the same as Sec. 40-2331 I.C.A. 1932. With respect thereto the Alabama Court says:

> "This Act expresses the positive public policy of this state with respect to insurance contracts within its purview."

See also:

> Beiser vs. Sovereign Camp W.O.W. (Ala.) 74 So. 235.

Yarbrough vs. Soverign Camp (W.O.W.) (Ala.) 97 So. 654.

In Smith vs. Sovereign Camp W.O.W. (Mo.) 77 S. W. 862 it is held:

> "The custom of the clerk of a local camp of a beneficiary association of accepting the dues of members in good health five days after they become due being in accordance with the constitution and by-laws of the order is no evidence of a waiver of payment when due by a sick member."

In Modern Woodmen of America vs. Tevis, 117 Fed. 370, heretofore cited in this brief it is held that:

> "The by-laws of the Modern Woodmen of America, which constitute a part of the contracts with its members and beneficiaries, provide that a member who fails to pay a benefit assessment at the time specified for its payment is ipso facto suspended, and his benefit certificate is thenceforth void; that he may be reinstated within a certain time, if in good health, by furnishing a warranty of that fact and paying his arrearages; that the clerk of the local camp shall collect and remit to the head camp the assessments paid in accordance with the by-laws; that he shall report to the head camp suspended members; that he is the agent of the local camp, and not of the head camp; and that no act or omission by him shall create any liability or waive any immunity or right of the society. *Held*: (1) The clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the term of the by-laws. (2) His authority is limited by the by-laws, and the members and beneficiaries are charged with knowledge of these limitations, because they are a part of their contracts. (3) The clerk of the local camp has no authority by

> contract, estoppel or waiver to bind the society to its members or beneficiaries either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health, in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp."

In Kiker vs. Sovereign Camp, W.O.W. (Ala.) 167 So. 313 it is held:

> "Knowledge of the secretary of the local lodge of benefit society that insured was not in good health and that certificate of good health had not been filed held not imputed to officers of society so as to charge them with waiver of such condition for reinstatement by acceptance of dues collected by secretary."

The case of Valentine vs. Head Camp, Pacific Juris. W.O.W. (Cal.) 180 Pac. 2, is very enlightening. The defense of waiver and estoppel was here asserted on the theory of knowledge of the financial secretary. The court held in favor of the defendant mutual fraternal association. In this case it is held that the local camp clerk was nothing more than a special agent of the defendant with defined powers known to members, so that he could not waive any requirements of the law or organization or by any act or course of conduct create an estoppel against the defendant. The Court holds:

> "In view of the limitations on the powers of the local camp clerk under laws of defendant fraternal organization, he could not by any course of conduct or possession of knowledge of insured's bodily health bind defendant in such manner as to estop it from defend-

> ing upon the ground that warrantly of insured as to bodily condition in application for reinstatement was false."

In Koehler vs. Modern Brotherhood of America (Mich.) 125 N.W. 49, it is held:

> "Where a condition for reinstatement to a mutual benefit association after suspension was that member be in good health, the local secretary could not waive the condition by accepting the dues of a suspended member while he was in a dying condition."

In the case of Salter vs. Security Benefit Association, (Kas.) 243 Pac. 1033, the same proposition is presented as in the case above. In this case it is held:

> "The acceptance by local officer of a fraternal beneficiary association of dues after membership has been lost by non-payment does not bind the association, especially under a statute which has been acted upon, authorizing such associations to adopt by-laws preventing waivers in its behalf by local officers."

We most respectfully submit that the foregoing authorities and others cited under "Points and Authorities" definitely sustain the position of the Appellant in this case. The cases followed by the trial court are either out of harmony with the great weight of authority or clearly distinguishable from this case.

III.

Cases cited in the Opinion of the Trial Court.

Reference is made in the Opinion (R 43) to the case of Rasicot vs. Royal Neighbors of America, 18 Ida. 85; 108 Pac. 1048. This case was decided April 16, 1910. It deals with a contract of a fraternal benefit society and while there is some language contained therein with reference to the subject of waiver and public policy, yet it is to be observed that the Court did not have before it a contract of the type and character involved in the case at bar nor statutes such as were later enacted. We respectfully submit that upon the facts it is not an authority against the position assumed by the appellant. It is to be observed, however, that at the 1911 session of the Idaho Legislature there was enacted Chapter 225 for the regulation and control of all fraternal benefit societies doing business in Idaho. This Act was approved by the Governor March 3, 1911. It is not improbable that some of the language used in the Rasicot case may have induced the enactment. In any event, this legislative enactment determined the public policy in Idaho with reference to these societies differently from that suggested in the Rasicot case. As heretofore pointed out, there is contained in the Act Section 8, which is now Sec. 40-2309 I.C.A. 1932, which, among other things provides that "the Certificate, the Charter, or Articles of Incorporation * * * Constitution and Laws of the Society and the Application for Membership * * * and all Amendments to each thereof, shall constitute the agreement between the Society and the members" and also Sec. 20, which is now Sec. 40-2331 I.C.A. 1932, and which has heretofore been quoted, and which authorizes the

Society to provide in its Costitution that "no subordinate body" nor any "subordinate officer" may waive any provisions of its Constitution and Laws, and that such provision shall be binding upon each member and all beneficiaries.

These statutory provisions announce a public policy of the state. This view has been quite universally adopted by the courts. In 1911 Alabama enacted statutes almost identical with the Idaho Statutes above referred to. The Supreme Court of Alabama decided the case of Woodmen of the World vs. McHenry, 73 So. 97, in 1916 and was confronted with the argument that notwithstanding such legislative enactment there could be a waiver. On Page 98 the Alabama Court quotes the statutory provisions and particularly Sec. 8 and Sec. 20 which are the same as Sec. 8 and Sec. 20 of the 1911 Session Laws of Idaho. The Court then says:

> "This act expresses the positive public policy of this state with respect to the insurance contracts within its purview. The provisions of the constitution, laws, and by-laws of the Sovereign Camp of the Woodmen of the World became and were factors in, and elements of the contract declared on in this action; and so in consequence of the enactment cited, in connection with the provisions of the laws of the order, which, in turn, in addition to the mandate of the statute (Section 8, pp. 703, 704, Gen. Acts 1911), gave appropriate effect to the application's provisions and requirements."

The Court then discusses the provisions of the contract and the argument urging a waiver, and says:

> "The positive law of this state (Gen. Acts, 1911, ante) has intervened to preclude a waiver by such an agent. Its mandate, in connection with the laws of the order

> and the provisions of the application, must be given appropriate effect."

The Texas Supreme Court, in the case of Sovereign Camp vs. Moraida (Tex.) 113 S. W. (2) 177, heretofore cited in this brief expresses its opinion on the effect of this statutory enactment on Page 180 by saying:

> "The legislature was not without power to grant fraternal benefit societies the authority conferred by Article 4846 and the exercise of such power cannot lawfully be thwarted by judicial decree in the light of the facts herein * * *."

These cases are illustrative of the holdings of the courts where the statutes are the same as the Idaho Statutes and the contract is of the same character as will be seen from numerous cases heretofore cited in this brief.

Aside from the fact that the Rasicot case was decided upon different facts and is not an authority against the Appellant herein, it is clearly apparent that any adverse effect of any dictum or statement therein mentioned is eliminated by the legislative enactment.

Reference is made in the Opinion of the Court to the case of Conkling vs. Knights and Ladies Security (Ia.) 166 N.W. 384, which is cited to support the contention that the delinquent payments were not made for reinstatement but to keep the policy alive (R. 45). Numerous cases hereinbefore cited definitely support the proposition that a waiver or an estoppel can never be insisted upon when the party against whom it is asserted has done nothing more than that required by its

contract. The Conkling case is quite different in some respects from the case at bar, but in any event, some time after it was decided the Supreme Court of Iowa decided Whitlow vs. Sovereign Camp, W.O.W. 202 N.W. 249, wherein the court had before it a certificate of the same character as in the case at bar and issued by the same Society. In the Whitlow case the Court enforced the provisions of the By-Laws and held that:

> "Where, by the By-Laws of the Association, failure to pay assessments on benefit insurance certificate works a forfeiture of certificate, failure to make such payments renders policy void without any declaration or affirmative act on the part of the Association."

Chandler vs. Royal Highlanders (Neb.) 162 N.W. 642 is cited in support of the proposition that the Society waived the right of forfeiture by accepting delinquent payments and this led the insured to believe prompt payment would not be insisted upon. It was held in this case, however, that there was no waiver and the statements for which the case is cited appear to be dictum. However, the facts discussed in the Chandler case, upon which a waiver might be predicated are quite different from the present case. Here delinquent payments could be made under the contract but they came for reinstatement and with a warranty of good health. If, however, the case should be considered contrary to appellant's position it is rendered ineffective by later Nebraska cases, upholding the forfeiture when dealing with contracts of the character now under consideration.

See:

Pope vs. Royal Highlanders (Neb.) 164 N. W. 1047;

Fowler vs. Sovereign Camp W. O. W. (Neb.) 183 N. W. 550;

Van Dahl vs. Sovereign Camp W. O. W. (Neb.) 264 N. W. 454;

Fairbanks vs. Sovereign Camp (Neb.) 266 N. W. 60;

Whitehorn vs. Royal Arcanum (Neb.) 269 N. W. 821.

There is cited the case of Kennedy vs. Grand Fraternity (Montana) 92 Pac. 971. In this case a statement is made to the effect that the Courts may find a waiver where the other party has been led to believe that strict enforcement of time of payment would not be insisted upon. However, the Montana Court holds against the waiver and on Page 976 says:

> "But we are unable to see how this doctrine can have any application to the case at bar. Kennedy's delinquency operated ipso facto to terminate his membership and to abrogate his contract."

So, in the case at bar, Mr. Krussman's delinquency operated ipso facto to terminate his contract and any payment thereafter made was for reinstatement pursuant to the terms of his contract and could not constitute a waiver. The Kennedy case, therefore, does not militate against the appellant but in reality is an authority in its favor.

Reference is made to the case of Order of United Travelers vs. Campbell, 115 Fed. (2) 743. We most respectfully suggest that this case does nothing more than announce what the

Circuit Court considered to be the law of the State of Washington as applied to the facts under consideration in that case. It is not an expression of the independent judgment of the Circuit Court of Appeals. Certainly the decision in the Campbell case would be different if the Supreme Court of Washington had decided the case of Sovereign Camp vs. Moraida (Tex.) 113 S. W. (2) 177, or Van Dahl vs. Soverign Camp (Neb.) 264 N. W. 454, or any other of the numerous cases cited in this brief.

Furthermore, it is to be noticed in the Campbell case the contract seemingly required a formal suspension of the Certificate and Notices were sent out for the delinquent installments and advice given concerning delinquencies, all of which is entirely absent in the case at bar. Any argument in this case that the member was mislead because the Society did precisely what the contract required is fallacious. There is no controlling court decision in Idaho contrary to appellants position and the statutes give it definite support. This Court, therefore, is free to give to these statutes and the contract under consideration a meaning which was obviously intended by the Idaho Legislature, and the membership of the Society. The clear and lucid opinions of numerous courts cited in this brief present compelling authority in support of the position of the appellant in this case.

CONCLUSION

In conclusion, therefore, we most respectfully urge that the learned trial court erred in the particulars herein before recited and in entering judgment against the appellant; that

said judgment should be reversed with directions to enter judgment in favor of the appellant.

Respectfully submitted,

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